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OCT 01 2007

In re Application of
Robert J. Bernardi et al.
Application No. 09/854,172
Filed: May 11, 2001
Attorney Docket No. 18864-
06052US
Title: AUTO-ADJUST NOISE
CANCELING MICROPHONE WITH
POSITION SENSOR

OFFICE OF PETITIONS

DECISION ON PETITION
PURSUANT TO
37 C.F.R. § 1.181(A)

BACKGROUND

This is a decision on the petition pursuant to 37 C.F.R. § 1.181(a), filed August 28, 2007, to withdraw the holding of abandonment.

The above-identified application became abandoned for failure to submit the issue and publication fees in a timely manner in reply to the Notice of Allowance and Issue Fee Due, mailed April 24, 2007, which set a shortened statutory period for reply of three months. No extensions of time are permitted for transmitting issue fees¹. Accordingly, the above-identified application became abandoned on July 25, 2007. A Notice of Abandonment was mailed on August 17, 2007.

RELEVANT PORTION OF THE MPEP

MPEP §711.03(c) (I) (A) sets forth, in toto:

In *Delgar v. Schulyer*, 172 USPQ 513 (D.D.C. 1971), the court decided that the Office should mail a new Notice of Allowance in view of the evidence presented in support of the contention that the applicant's representative did not receive the original Notice of Allowance. Under the reasoning of *Delgar*, an allegation

¹ See MPEP § 710.02(e).

that an Office action was never received may be considered in a petition to withdraw the holding of abandonment. If adequately supported, the Office may grant the petition to withdraw the holding of abandonment and remail the Office action. That is, the reasoning of Delgar is applicable regardless of whether an application is held abandoned for failure to timely pay the issue fee (35 U.S.C. 151) or for failure to prosecute (35 U.S.C. 133).

To minimize costs and burdens to practitioners and the Office, the Office has modified the showing required to establish nonreceipt of an Office action. The showing required to establish nonreceipt of an Office communication must include a statement from the practitioner stating that the Office communication was not received by the practitioner and attesting to the fact that a search of the file jacket and docket records indicates that the Office communication was not received. A copy of the docket record where the nonreceived Office communication would have been entered had it been received and docketed must be attached to and referenced in practitioner's statement. For example, if a three month period for reply was set in the nonreceived Office action, a copy of the docket report showing all replies docketed for a date three months from the mail date of the nonreceived Office action must be submitted as documentary proof of nonreceipt of the Office action.

The showing outlined above may not be sufficient if there are circumstances that point to a conclusion that the Office action may have been lost after receipt rather than a conclusion that the Office action was lost in the mail (e.g., if the practitioner has a history of not receiving Office actions).

Evidence of nonreceipt of an Office communication or action (e.g., Notice of Abandonment or an advisory action) other than that action to which reply was required to avoid abandonment would not warrant withdrawal of the holding of abandonment. Abandonment takes place by operation of law for failure to reply to an Office action or timely pay the issue fee, not by operation of the mailing of a Notice of Abandonment. See *Lorenz v. Finkl*, 333 F.2d 885, 889-90, 142 USPQ 26, 29-30 (CCPA 1964); *Krahn v. Commissioner*, 15 USPQ2d 1823, 1824 (E.D. Va 1990); *In re Application of Fischer*, 6 USPQ2d 1573, 1574 (Comm'r Pat. 1988).

ANALYSIS

The showing in the present petition is not sufficient to withdraw the holding of abandonment because it is incomplete.

Petitioner has included a statement that a thorough search of the file jacket and docket records were conducted. Petitioner has further included a copy of the docket record, however the copy of the docket record that was provided is not legible. As such, it does not appear that the copy that Petitioner has submitted is electronically reproducible.

It follows that the present petition must be **DISMISSED**.

CONCLUSION

Any reply must be submitted within **TWO MONTHS** from the mail date of this decision. Extensions of time under 37 C.F.R. § 1.136(a) are permitted. The reply should include a cover letter entitled

Decision on Petition pursuant to 37 C.F.R. § 1.181(a)

"Renewed Petition Under 37 C.F.R. § 1.181(a)." This is not a final agency action within the meaning of 5 U.S.C § 704. The renewed petition should indicate in a prominent manner that the attorney handling this matter is Paul Shanoski, and may be submitted by mail², hand-delivery³, or facsimile⁴. Registered users of EFS-Web may alternatively submit a response to this decision via EFS-Web⁵.

On renewed petition, Petitioner may wish to consider either submitting a higher quality copy of this docket record, or refrain from submitting the copy via facsimile transmission.

If responding by mail, Petitioner is advised not to place the undersigned's name on the envelope. Only the information that appears in the footnote should be included - adding anything else to the address will delay the delivery of the response to the undersigned.

Telephone inquiries regarding this decision should be directed to the undersigned at (571) 272-3225⁶. All other inquiries concerning examination procedures or status of the application should be directed to the Technology Center.



Paul Shanoski
Senior Attorney
Office of Petitions
United States Patent and Trademark Office

Encl. Copy of docket record as it appears in the electronic file

2 Mail Stop Petition, Commissioner for Patents, United States Patent and Trademark Office, P.O. Box 1450, Alexandria, VA, 22313-1450.

3 Customer Window, Randolph Building, 401 Dulaney Street, Alexandria, VA, 22314.

4 (571) 273-8300- please note this is a central facsimile number.

5 <https://sportal.uspto.gov/authenticate/authenticateuserlocalepf.html>

6 Petitioner will note that all practice before the Office should be in writing, and the action of the Office will be based exclusively on the written record in the Office. See 37 C.F.R. § 1.2. As such, Petitioner is reminded that no telephone discussion may be controlling or considered authority for any further action(s) of Petitioner.

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<div> <div>US</div> <div>CPA</div> <div>Pending</div> <div>09854172</div> <div>INAB3200</div> </div>							
<div> <div>Chen Young</div> <div>05-Aug-2004</div> </div>							

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Division: Call Center Office Division I		United States of America			
Case Type: CIP		Status: Pending			
Case ID: 09/854,172		Date: 11-May-2001			
Parent Case:		Parent Case:			
Tax Schedule:		Tax Schedule:			
Agent: JK		Agent Reference:			
Date Created: 03/01/2002		Last Updated:			
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Case Number	01-6052	County	US	Supervisor		
Mail Center/Office/Division	United States of America					
4 Action Due Date	Aug 2001	Indicator				
Information Disclosure Stmt	11-Aug-2001	Due Date				
Foreign Filing Reminder	11-Nov-2001	Reminder				
Foreign Filing Due	11-May-2002	Due Date				
US 3 Month Off Follow Up Date	29-Jul-2001	One Date				
User	mikefoll	Date Created	03-Jun-2002	Last Modified	03-Jun-2002	
Invoice	Generate Letter					